FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6513

WILLIE LEE BELL,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

REPLY BRIEF OF PETITIONER

H. FRED HOEFLE
CHARLES LUKEN
Second National Building
830 Main Street
Cincinnati, Ohio 45202
1-513-241-1268

Attorneys for Petitioner

Of Counsel:

JACK GREENBERG
JAMES M. NABRIT, III.
JOEL BERGER
DAVID KENDALL
10 Columbus Circle
New York, N.Y. 10019

ANTHONY G. AMSTERDAM
Stanford Law School
Stanford, California 94305

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6513

WILLIE LEE BELL,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

REPLY BRIEF OF PETITIONER

THE RAISING OF CONSTITUTIONAL ISSUES IN THE STATE COURTS

In its brief, at p. 19, Respondent suggests that some of the attacks made by Petitioner on Ohio's death penalty statutes were never raised in the Ohio Courts.

In the trial court, Petitioner argued (1) the narrowness of the statutory mitigating circumstances [A.107-8]; (2) the absence of meaningful consideration of Petitioner's youth [A.108]; (3) the absence of meaningful consideration of Petitioner's minor role in the killing [A.108]; (4) the absence of consideration of the offender's prior record as a meaningful criterion [A.108]; (5) the absence of consideration of whatever other mitigating factors the offender sought to offer [A.107-8]; and (6) the Sixth Amendment

challenge that coercion of jury waivers is implicit under the Ohio capital statutes [A.109].

In our brief in the Ohio Court of Appeals, at p. 8, we attacked the Ohio capital statutes because "the youth of the appellant, the fact that the appellant told the truth, the most significant fact that the State could not prove that the appellant participated in the actual killing under any interpretation of the facts, the fact that appellant cooperated with the police, could not be considered as circumstances which could be considered in extending mercy." At p. 27 of that brief, we also attacked the coercion by the statutes which forced Petitioner to waive his right to trial by jury.

In the Ohio Supreme Court, our brief again attacked the Ohio capital statutes because the above-mentioned factors were not permitted to be considered under Ohio statutes. See Petitioner's brief in the Ohio Supreme Court at p. 17. The jury waiver question was raised therein at p. 37 and absence of homicidal participation at p. 51. The *Gregg* issues were not specifically included in the brief as such when the brief was filed in the Ohio Supreme Court on June 7, 1976, but were argued in that Court on October 14, 1976, and were included in the Petition for Rehearing therein [A.30-35].

At pp. 24, 65 and 66 of its brief, Respondent accuses Petitioner of attempting to "sneak into this matter a completely new issue"—the Sixth Amendment issue. On p. 66, we are alleged to have omitted the absence of jury participation as an issue from our Petition. There are two Sixth Amendment issues before the Court: the absence of jury participation in the sentencing process and the needless encouragement of jury waivers. Both appear in our Petition, the former as Question I-F at pp. 32-35, and the latter as Question I-C at p. 17, and both were included within Question I, as to all of which certiorari was granted by this Court.

Petitioner was tried 18 months before the *Gregg* decisions, and his brief was filed in the Ohio Supreme Court three weeks before those decisions. Nevertheless, his principal constitutional arguments here were all raised and decided below. A few

subsidiary contentions were not, but these are procedural questions of law inherent in the Ohio statutory scheme, lack of jury participation and misallocation of the burden of proof, which have been found constitutional by the Ohio Supreme Court in recent cases, *State v. Weind*, 50 Ohio St.2d 224 as to the former, and *State v. Downs*, 51 Ohio St.2d 47 as to the latter. The question of the adequacy of state-wide appellate review could not have been raised before the *Gregg* cases, which first raised the constitutional significance of that issue, and it also would have been presumptuous to argue the absence of such consideration at a time when the Ohio Supreme Court had not yet announced a decision in a post-*Furman* capital case, the first of which was announced six weeks after our oral argument before that Court. Under such circumstance there is no impediment to consideration by this Court of each issue raised in our brief, *O'Connor v. Ohio*, 385 U.S. 92 (1966), *Leary v. United States*, 395 U.S. 6 (1969).

I.

A. The Ohio Capital Punishment Statutes Are So Narrow And Rigid That They Affront The Constitutional Principles Forbidding Mandatory Death Sentences.

We have argued that the Ohio statutory mitigating factors are so narrowly drawn and more narrowly interpreted by the Ohio Supreme Court that the Ohio scheme is virtually mandatory and precludes meaningful consideration of factors indispensible in any constitutional capital sentencing process. In support of our contentions, we examined not only the language of a great number of post-*Furman* capital decisions of the Ohio Supreme Court, but the results of those cases as well.

Respondent, however, has totally ignored the practical meaning and effect of the Ohio statutes and has also ignored the particularly brutal and eviscerating interpretation of those statutes by the Ohio Supreme Court, choosing instead to rely upon selected language from the statutes and the decisions of the Ohio court, with the apparent intention of emphasizing the words of that Court while ignoring what that Court has actually done. Frequently, finding no solace in the language of the Ohio Supreme Court, Respondent is forced to rely upon many unreported lower state court decisions. Its abortive effort to obtain undeserved mileage from such decisions illustrates the weakness of Respondent's position.

We have demonstrated that the first statutory mitigating factor, victim-inducement or facilitation, is virtually illusory, and noted that the Ohio Supreme Court has yet to interpret this factor.[1] Respondent alleges, however, that this factor is really quite broad, and illustrates its contention with an unreported appellate decision, which actually establishes our contention, *State v. Hines & Lucas*, # 634,639 (Fifth.Dist. Court of Appeals, 2-25-77). At the outset, we note that an Ohio statute, § 2503.20 R.C., provides that opinions be reported for publication "before they shall be recognized by and receive the official sanction of any court." Thus, unreported decisions of an Ohio court are not binding on any Ohio court, and certainly, contrary to Respondent's assertion, cannot constitute the law of Ohio, see *National Surety v. Blackburn*, 62 O.L.A., 106 N.E.2d 780, 781 (Ohio App. 1951).

Nonetheless, Respondent's reliance upon *Hines & Lucas* is misplaced, for several reasons: to the extent that the case is binding, it is so in only one of Ohio's eleven appellate districts; second, and more importantly, that decision applies the victim-inducement factor even more narrowly than required by the

[1]Although this factor still has not been interpreted by the Ohio Supreme Court, it was referred to in the recent case of *State v. Cooper*, 52 Ohio St.2d 163 (1977).

statute, as the *Hines* court held that before an offender may avail himself of victim-inducement mitigation, it must first appear that the acts of the victim constituting inducement be unlawful. The addition by judicial fiat of an additional prerequisite to the application of victim inducement mitigation makes it even less likely that it will apply in any given situation. Ohio's victim-inducement mitigation under the reading urged by Respondent is thus more narrow and illusory than in the statute itself.

Respondent's brief wholly ignores our argument that the second statutory mitigating factor is illusory. Instead, relying solely on carefully selected language from *State v. Woods*, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976), and disregarding the outcome of the case, Respondent expansively declares, at p. 40, that in *Woods* "the Ohio Supreme Court has substantially broadened the definition of coercion and duress." Nowhere is the absurdity of that statement, and the vast discrepancy between the words and the actual results of the Ohio Supreme Court's capital decisions more apparent than in *Woods*. The reader is impelled to conclude that Woods' life will be spared, only to be confronted with the awful reality that Woods is condemned to die in an opinion which convincingly demonstrates that he deserves to live.

In reply to our challenge to the Ohio statutes regarding the third and final mitigating circumstance, that the offender suffered from a mental deficiency or psychosis, primarily causing the killing, Respondent relies almost exclusively on the expansive language in *State v. Black*, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976), ignoring the additional language in that case that to define such terms as "mental deficiency" is to narrow them. Most critically, Respondent ignores the fact that in several post-*Black* cases, the Ohio Supreme Court ignored its language in that case and condemned a moron with an I.Q. of 58 (*State v. Royster*, 48 Ohio St. 381, 358 N.E.2d 616) who would seem to qualify for a life sentence even under the *Bayless* definition; see also *State v. Harris*, 48 Ohio St.2d 351, 359 N.E.2d 67, *State v. Edwards*, 49

Ohio St.2d 31, 358 N.E.2d 1051, *State v. Weind*, 50 Ohio St.2d 224, 364 N.E.2d 224, and the instant case. In fact, *the Ohio Supreme Court has upheld the death sentence in every case it has reviewed to date where the offender suffered from a mental abnormality*. Taken with the fact that this third mitigating statutory factor is the only factor concerned with the characteristics of the offender, rather than with the circumstances with the offense, the interpretation of such factor by the Ohio Supreme Court, and Respondent's refusal to acknowledge the effect of the decisions, exemplifies that the third mitigating factor is virtually illusory.

Of course, Petitioner's case best exemplifies the narrowness of the mitigating factor, and reveals that, despite *Black*, the Ohio Supreme Court intends to adhere to its narrow definition first given in *Bayless*: Petitioner has established that at the time of the offense, he was 16 years of age; had taken drugs on a daily basis continuously for three years preceding arrest, and on the night of the murder as well; that he had an I.Q. of 81 two years before the offense, and it was estimated at 90 by psychiatrists a few weeks later; that he was placed in a special school for emotionally disturbed youth; that his teachers described him as emotionally immature and constantly on drugs; that he was suffering, according court psychiatrists, from a moderately diminished capacity to comprehend the seriousness of his situation, even after he had been indicted as an adult and was aware that he could die in the electric chair.[2] If, as Respondent contends, the Ohio Supreme Court's definition of mental deficiency is generously

[2]This is to say nothing of his capacity to comprehend the seriousness of his situation on the night of the murder. Further, Respondent quotes Petitioner's statement to the psychiatrists that his fate was "only a matter of life and death," apparently to convey the impression that Petitioner is an unfeeling brute. To the contrary, such a remark demonstrates Petitioner's inability to appreciate his peril and underscores his mental aberration.

broad, it is inconceivable that Petitioner Bell is now on death row. His case is itself compelling evidence that the occasional expansive language carefully culled by Respondent from the statute and a few Ohio capital cases is not the law of Ohio, but that the Ohio mitigating mental condition, far from being broad and generous, is narrow to the point of nonexistence.

B. The Ohio Capital Sentencing Statutes Preclude The Meaningful Consideration Of The Character And Record Of The Offender As Part Of The Capital Sentencing Process.

On page 44 of its brief, Respondent attempts to convince the Court that adequate consideration of the character and record of the offender is given under the Ohio statutes, and cites, with great emphasis, *part* of § 2929.04(B) R.C. in support of that contention. Most significant, however, is the portion of the statute *omitted* by Respondent—the part that limits the consideration of the "history, character and condition" of the offender to the narrow inquiry of whether one of the three exclusive mitigating factors exists.[3]

Respondent further quotes from the opinion of the Ohio Supreme Court below that the statute is strictly construed in favor of the accused [A.141-2]. However, the language of the

[3]The restrictive nature of the statutory provision concerning the "history, character and condition of the offender" is immediately apparent when that phrase is read with the rest of the statute: ". . . the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character and condition of the offender, one or more of the following is established by a preponderance of the evidence: [the statute then cites the three mitigating circumstances - victim inducement, duress, coercion and provocation, and psychosis and mental deficiency as a primary cause of the offense, through not amounting to insanity.].

Court is misconstrued by Respondent into an allegation unsupported by any case law that the Ohio statute thus construed permits consideration of particularized mitigating factors concerned with the character and record of the offender independent of the existence of the three mitigating factors provided in the statute. It does not so permit. Even under the most expansive reading of the Ohio cases, it is clear that particularized attributes of the offender are not accorded independent significance, but may be considered only with respect and to the extent that they are relevant to the existence of the three narrow statutory mitigating factors. In our brief, we demonstrated that mitigating factors generally felt to be significant, and in some instances constitutionally required, have little or no relevance to the existence of the mitigating factors cognizable under the Ohio statutes.[4]

Further, there are certain other factors, also recognized by this Court, which have no relevance to the existence or absence of the

[4]We take issue with what has been argued by Respondent and stated below by the Ohio Supreme Court—that "age" is relevant to the existence of a mental deficiency. While generally such a relationship between age and mental condition might seem arguable, youth is not relevant under the peculiar definition of the statutory term "mental deficiency" in the post-*Furman* capital cases of the Ohio Supreme Court. It will be recalled that the Court equates mental deficiency with mental retardation, *State v. Bayless, supra.*, and that such is the state of being a moron, imbecile or idiot. It will further be recalled that the determination of mental retardation is made by measuring mental age against chronological age, resulting in a quotient known as the Intelligence Quotient, or I.Q. The crucial fact here, ignored by Respondent, is that I.Q. does not depend upon youth. One may have an I.Q. of 200 at age 15 or at age 50; similarly, one may have an I.Q. of 60 at age 15 or at age 50. Consequently, the youth of the offender, considered by this Court as an important mitigating factor in *Gregg*, cannot materially assist an Ohio sentencer in determining the existence of "mental deficiency" under the Ohio law as interpreted by the Ohio Supreme Court.

Ohio mitigating factors and which are thus accorded no significance in the Ohio sentencing procedures.[5]

An indication of the correctness of our position in this respect is the fact that Respondent cites only two lower court decisions, both unreported,[6] in support of its conclusion that Ohio's

[5]The extent of an offender's cooperation with police is an important mitigating factor, also recognized by this Court in *Gregg*. Yet, cooperation has nothing to do with a determination of whether the victim induced his death, with whether the offender acted under duress, coercion or provocation, or with whether the offender is psychotic or mentally deficient primarily causing the offense. Cooperation is thus accorded no significance under Ohio's statutes, a fact which is underscored in this case by the fact that Petitioner was completely cooperative with police and gave them the only first hand account of the grisly events culminating in the death of Mr. Graber, and which account undoubtedly assisted in the successful prosecution of the codefendant; yet Petitioner was condemned to death by each of the thirteen Ohio judges who passed upon his sentence without any consideration of his cooperation with law enforcement officials.

In *Gregg*, this Court also stated that whether an offender has a record of prior capital offenses should have some bearing upon his sentence. The absence of such a record did not assist the Ohio courts in determining whether the victim induced his death, whether Petitioner was under the influence of duress, coercion or provocation, and whether Petitioner is mentally deficient or psychotic. It should come as no surprise, then, that the absence of a prior capital record did not affect Petitioner's death sentence.

The same analysis can be made for other particularized facets of the offender's personality found to have significance by this Court, but which are accorded no significance under the Ohio scheme: moral justification, *Harry Roberts v. Louisiana*, 97 S.Ct. 1993, emotional disturbance, the influence of drugs or other intoxicants, etc. This case is the perfect example how even the presence of almost *all* of the factors deemed important in *Gregg* and *Harry Roberts* are accorded no significance, and hence have no effect under the Ohio laws. Consequently, in this case, a youth has been condemned to death though he manifests several constitutionally mitigating characteristics.

[6]See our discussion, ante at p. 3-5, regarding the Ohio statute providing that unreported decisions are entitled to no consideration.

statutes are sufficiently broad to permit independent consideration of these factors. We have previously discussed *State v. Hines & Lucas, supra*, and need not redemonstrate its inutility.

The other case, *State v. Mascus*, cited at p. 45 of Respondent's brief, is an unreported case in the Court of Common Pleas of Hamilton County. Apart from the fact that an unreported trial-level decision cannot constitute the law of Ohio, *Mascus* is of no assistance to Respondent, as the language quoted is ambiguous, and the trial court concluded there that one of the statutory mitigating circumstances had been established.[7]

[7]We anticipate that Respondent will seek to rely upon a very recent unreported decision of a visiting judge in the Court of Common Pleas of Hamilton County, at the penalty trial in a capital case in which counsel for Petitioner represented the offender, *State v. Ervin*, [Case No. B 772003, 12-21-77]. In that case, the trial judge found the presence of the mitigating circumstances of duress and coercion, but also stated that in his interpretation of § 2929.04 (B) the word "regardless" permitted him to consider mitigating factors other than those enumerated in the statute, and referred to the defendant's youth, cooperation and the fact that the codefendant, said to be the actual killer, was acquitted.

Any reliance which might be placed by Respondent on *Ervin* in this case will be misplaced for no less than five reasons:

(1) The decision re discretion was dicta. Since the trial court found a statutory mitigating factor to exist, his interpretation that he could go beyond the statute was dicta.

(2) The decision was based upon an erroneous reading of the statute. The judge's decision could only be justified if the word "regardless" referred to the existence of the mitigating circumstances later appearing in the statute. Yet the statute clearly states that "Regardless of whether one or more of the *aggravating* circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, . . ."

(3) The decision was contrary to Ohio law. Petitioner had, to a more certain degree than did Ervin, the same, save for one, mitigating factors: youth (Petitioner was 16, Ervin 19), cooperation (Petitioner gave a full statement voluntarily, was described as cooperative by police, and reiterated the truth of the statement at the penalty trial; Ervin denied at trial ever having made the statement) and he was dominated by a

(continued)

There is, however, a recent reported decision which is of more than passing interest in considering whether Ohio's capital statutes adequately provide for the meaningful consideration of the character and record of a capital offender as part of the sentencing process. See *Commonwealth v. Moody*, ___ A.2d ___ (11-30-77). In *Moody*, the Pennsylvania Supreme Court rejected as unconstitutional a statute[8] remarkably similar to, and indeed somewhat broader than, the Ohio statutes here under attack, for the precise reason that the only offender-related statutory mitigating factor, "even if . . . liberally interpreted, . . . does not permit the sentencing authority in making its ultimate

(footnote continued from preceding page)

codefendant (the *Ervin* judge cited the fact that the codefendant was a big man and Ervin was known as "Shorty." Yet Petitioner was also considerably smaller than his codefendant, who, in addition, was armed with a sawed-off shotgun.). Thus, if the decision of the Ohio Supreme Court in our case below represents the law of Ohio, as it must, then the *Ervin* decision was contrary to law.

(4) The Ervin decision, to the extent that it represents the law of Ohio, incurably infects Ohio capital procedure with the arbitrary and capricious discretion to impose the death penalty condemned in Furman v. Georgia. Since Petitioner raised below the same mitigating factors which were considered in the "new-found" discretion in *Ervin*, the disparity between Petitioner's and Ervin's sentences indicates that, if *Ervin* is correct, whether one man lives and another dies depends, not upon guided discretion, but upon judicial whimsy of the sort ruled unconstitutional in *Furman*. Further, Petitioner Bell, Lockett and the 81 others presently on Ohio's death row were condemned without the sort of consideration extended by the *Ervin* judge. If that judge is correct, the violation of *Furman* implicit in that case renders all death sentences in Ohio before the date of that decision constitutionally infirm under *Furman*, to say nothing of the raising of an additional equal protection issue.

(5) The decision is an unreported trial-level case, and thus cannot constitute the law of Ohio. See our discussion *ante*, at pp. 3-5 re the inutility of unreported cases under the Ohio statute.

[8]18 Pa.C.S.A. § 1311 (1977-78 Supp.).

decision to focus sufficiently upon the *entire* character and record of the offender," and therefore affronts the constitutional requirement that "the sentencing authority [must] be allowed to consider whatever mitigating evidence relevant to his character and record the defendant can present." [Emphasis added]

The Pennsylvania court stated its concerns with the restrictiveness of the consideration which could be accorded under the statutes to the character and record of the defendant:

> Of the three [mitigating circumstances] listed,[9] only subsection (d)(2)(i) [age, lack of maturity or youth of the defendant at the time of the crime] can be said to focus the jury's attention upon the character and record of the defendant as opposed to the circumstances of the crime, and that only to the limited extent of determining his age, lack of maturity or youth *at the time of the killing*. [Emphasis is the Court's] . . . *the absence of a prior criminal record or even positive achievements or good works cannot be considered as mitigating*. [Emphasis ours.]

Significantly, the Pennsylvania Supreme Court rejected the contention of the prosecution, echoed in the present case, that the statutes ostensibly do permit consideration of evidence of the defendant's character and record. That court recognized, precisely as we have urged herein, that where this kind of evidence is considered relevant only to the establishment of three exclusive narrow statutory circumstances, such consideration does not satisfy the command of the Constitution that all facets of the character and record of the offender must be meaningfully

---

[9]The Pennsylvania statute, like Ohio's provided a list of aggravating circumstances and required a bifurcated trial. The mitigating circumstances are (1) age, lack of maturity, or youth of the defendant at the time of the killing, (2) victim inducement and (3) duress. It is immediately apparent that Ohio and Pennsylvania share two of three mitigating circumstances, and that the Pennsylvania "age, lack of maturity or youth" is broader than Ohio's "psychosis or mental deficiency" primarily causing the death of the victim.

considered in capital sentencing, *Harry Roberts v. Louisiana*, 97 S.Ct. 1993 (1977).

The Pennsylvania Court, ruling its state's statute unconstitutional, found:

> . . . the constitutional defect of section 1311 is that, unlike the statutes approved by the Supreme Court, it so narrowly limits the circumstances which the jury may consider mitigating that it precludes the jury from a constitutionally adequate consideration of the character and record of the defendant.

Moody is impressive authority for the position taken in our brief that Ohio's almost identical and even more restrictive capital statutes are unconstitutional.

I-D

In Petitioner's brief, we noted that only six of the 362 persons executed since 1955 were nontriggermen.[10] Subsequent research based upon the same sources indicates that, in the same period, but three of the 362 persons executed were under the age of 18.[11] America is thus as reluctant to execute its children as it is to

---

[10]Since the filing of our brief, we have discovered additional executions, all of triggermen, whose cases were reported in the National Reporter System: SOUTH CAROLINA: *State v. Waitus*, 77 SE2d 256 (1953), 83 SE2d 629 (1974), *State v. Wright*, 90 Se2d 492 (1955), *State v. Byrd*, 93 SE2d 900 (1956); TENNESSEE: *Voss v. State* 278 SW2d 667 (1955); VIRGINIA: *Lucas v. Commonwealth*, 112 SE2d 915 (1960); OKLAHOMA: *Young v. State*, 357 P.2d 562 (19); UTAH: *State v. Rodgers*, 8 Utah 2d 156, 329 P.2d 1075 (1958); FLORIDA: *McVeigh v. State*, 73 So2d 694.

We have also discovered an erroneous citation in Appendix A in our brief: Case No. 217 is corrected cited as *Wiggins v. State*, 80 So.2d 17 (1955).

[11]The three, all age 17, one year older than Petitioner on the date of the offense herein, are J. Johnson (1961, Alabama); Leonard Shockey (1959, Maryland); and Norman Roye (1956, New York). All were black.

execute those not clearly shown to have personally perpetrated the homicide for which they were convicted.

In an attempt to convince the court that non-triggermen are frequently condemned, Respondent cites several cases. Before considering those, we emphasize that we have not contended that non-triggermen are not sentenced to death with some frequency, but merely that when it comes time to execute the sentence of death, non-triggermen are executed in the rarest of cases.

An analysis of the five cases thus cited by Respondent is revealing: in each case the record reveals that the defendant actually killed someone (and was thus not the non-triggermen Respondent claims), or knew in advance of the killer's intent, or participated in a multiple murder. None of these factors is shown in the present case.[12] Thus the cases cited by Respondent do not support the acceptability or the constitutionality of the concept of death by association, where one who did not kill anyone, who did not possess any homicidal intent or who did not even know that someone would be killed, may be condemned for the fatal act of his codefendant.

In Part I-D of its brief, as well as in other sections, Respondent makes several allegations concerning the facts below which merit brief comment. Throughout its brief, Respondent imputes acts of codefendant Hall to Petitioner by the use of the word "they" to

[12]In *Shockly v. State*, 338 So.2d 33 (Fla. 1976), the defendant admitted participation in a homicidal scheme, knowing for days that the death of the victim was intended by the killer. In *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), the Florida Supreme Court found that the defendant was, in fact, the triggerman. In *Coleman v. State*, 226 S.E.2d 911 (Ga., 1976), the Georgia Supreme Court found that "the defendant killed Chester Alday with a single shot in the head." Coleman is hardly a non-triggerman. In *Hill v. State*, 229 S.E.2d 737 (Ga. 1976), the defendant's sentence was commuted to life imprisonment on September 28, 1977 - see the records of the Georgia Pardon & Parole Commission, and in *Smith v. State*, 222 S.E.2d 308 (Ga. 1976), the defendant had advance knowledge and complicity in a multiple murder. Clearly, all of these cases cited by Respondent are distinguishable from our situation.

describe what the record reveals are acts solely perpetrated by Hall. Further, Respondent states that Petitioner held a shotgun on witness Hardin the day after the murder [R. Brief, p. 15]. However, the record reveals that the witness saw no such thing, and, more importantly, Petitioner's objection was at first sustained to this evidence, which was then accepted on the basis of the representation of the prosecutor that it would be tied in by Petitioner's statement. That statement, however, made no reference to this disputed testimony, and it must be assumed that the trial court did not consider it. Thus, Respondent's allegation that Petitioner handled a gun is totally unsupported. [R. 281-4] Finally, in a case cited by Respondent is another context, *Cooper v. State, supra*, the Florida Supreme Court ruled that evidence based upon a witness' sense of hearing of car doors allegedly closing was speculative and properly excluded. Such a ruling applied here would make Pierce's testimony worthless. Thus, the only evidence other than Petitioner's statement is circumstantial, and is totally consistent with Petitioner's contention that he did not participate in the killing; it thus cannot be cited to prove the opposite, *State v. Kulig*, 37 Ohio St.2d 157 (1974).

II.

D. The Adequacy Of Ohio Appellate Review Of Capital Sentences.

It suffices here to note that the cases cited on page 79 of Respondent's brief are not relevant to the sort of appellate review of sentencing that this Court approved in *Gregg*.[13] Both *State v. Deitsch* and *State v. Ruppert* were reversed on grounds totally unrelated to the imposition of the death penalty: *Deitsch* for insufficiency of evidence of an aggravating circumstance;

[13]Many of the cases cited by Respondent in this section of its brief are unreported and therefore cannot properly be considered here. See p. 3-5.

Ruppert because of an improperly obtained waiver of the right to trial by jury.

In *State v. Palmore*, Respondent correctly asserts that the dismissal of a specification (and the death penalty) by a trial judge on a guilty plea "in the interests of justice" under Ohio Crim. R. 11(C)(3) was reversed by the Court of Appeals because there were no standards set forth for the dismissal. However, after Respondent filed its brief, a three judge trial panel, considering *Palmore* on remand, held that the decision of the Court of Appeals had been subsequently overruled by the Ohio Supreme Court in *State v. Weind, supra*, in which the dismissal practice was upheld. The present law in Ohio thus permits the elimination of the death penalty on a guilty plea if the trial judge concludes that the death penalty would not be "in the interests of justice." It is an understatement to say with Respondent and the Court of Appeals that, as Rule 11(C)(3) has now been authoritatively construed by the Ohio Supreme Court in *Weind* "the distinct specter of arbitrary and freakish application of capital punishment [condemned in *Furman*] then arises to haunt the Ohio procedure."

Respectfully submitted,

/s/ H. FRED HOEFLE
H. FRED HOEFLE and
CHARLES LUKEN
Second National Building
830 Main Street
Cincinnati, Ohio 45202

Attorneys for Petitioner

Of Counsel:

JACK GREENBERG
JAMES M. NABRIT, III.
JOEL BERGER
DAVID KENDALL
10 Columbus Circle
New York, N.Y. 10019

ANTHONY G. AMSTERDAM
Stanford Law School
Stanford, California 94305